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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

July 11, 2001

Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Western Wireless Corporation Petition for Designation  
as an Eligible Telecommunications Carrier and for  
Related Waivers to Provide Universal service to the  
Crow Reservation in Montana, CC Doc. No. 96-45, DA  
99-1847

*Ex Parte* Submission

Dear Ms. Salas:

On June 10, 2001, Michael Strand and David Cosson, representing Project Telephone Company met with Commissioner Martin and Sam Feder to discuss the above proceeding. The "Presentation of Project Telephone Company to FCC," was distributed along with copies of previous *Ex Parte* filings from June 29 and March 27, 2001, and a copy of the attached Montana Independent Telecommunications Carriers Advanced Services/Facilities Map. Copies of these documents were provided with the report of our meeting with the Common Carrier Bureau staff on July 9, 2001.

The discussion focused on the question of whether the authority of the tribal government over the trust land portion of the Reservation necessarily deprived the state commission of jurisdiction to designate a non-Indian company as an ETC for that portion of the reservation, even if the state retained ETC authority as to areas of the reservation held in fee simple. The position of Project Telephone Company is that whatever jurisdiction the tribal government may have over Western Wireless under the first exception to the general rule of the Supreme Court's *Montana* decision, such jurisdiction is not exclusive and does not preclude or preempt state jurisdiction. Thus, although the tribal government's authority is greater in regard to service on the trust land, in neither event is the

state preempted.

If both the state and the tribe have jurisdiction to regulate a carrier there is no conflict over which entity has authority to act on an ETC application since the Communications Act clearly delegates authority to state commissions and not the FCC, unless the state has no jurisdiction at all.

The entire modern Supreme Court jurisprudence leaves no doubt that state jurisdiction is preempted only when the exercise of that jurisdiction would conflict with a federal program intended to benefit Indians or is inconsistent with the inherent sovereign right of a tribe to govern itself.. The leading examples of conflicts are found in the *White Mountain Apache* and *Mescalero Apache* decisions where state taxation or regulation would have interfered with specific federal programs. An example of need to protect a tribe's inherent sovereignty is in *Merrion v. Jicarilla Apache Tribe* in which the tribe's right to apply a severance tax on non-Indians for oil and gas removed from leased trust land was affirmed. Neither these, nor any other cases of preemption remotely resemble the situation where a state, which has regulated telephone service on reservations for over eighty years, acts on an ETC application pursuant to specific Congressional authority.

Here, the Congressional intent is that state commissions should act on ETC applications. If the FCC finds that a state commission has no jurisdiction, there is no enhancement or protection of the tribe's right to govern itself, because the decision will be made by the FCC, not the tribal government. The residents of the reservation will receive the same benefits from action on an ETC application whether the decision is made in Helena, Montana or Washington, D.C. Where the FCC has acted under Section 214(e)(6) in Arizona, Delaware and Wyoming, the state commission has not claimed jurisdiction. The Montana PSC has been given explicit jurisdiction by the state legislature and has stated to the Commission that it will act on any application filed by Western Wireless.

The question of the implications of an FCC finding that the state commission's authority under Section 214(e) is preempted by tribal sovereignty, for all or a portion of a reservation, was discussed. The Project Telephone representatives noted that a "checkerboard" designated service area would likely cause substantial administrative difficulties for USAC, but in any event could not be implemented unless and until the Commission and the Montana PSC agreed, following the procedures in Section 214(e)(5) of the Act, to establish a service area different from the study areas of the two Rural Telephone Companies involved, Project and Range Telephone Cooperative.

A further implication of a preemption of state jurisdiction, in whole or in part, is that a finding that the state lacks jurisdiction to act on ETC applications on all or part of the reservation necessarily implies that existing ETC designations of Project and Range, as well as all other existing ETC designations were invalid *ab initio*. Further, all other forms of state regulation of service provided to reservation residents, such as rate, entry and exit, service quality and complaints must also be invalid on the Crow Reservation and all other reservations. It is no answer, as Western Wireless appears to claim, that a non-Indian company has some sort of agreement with the tribal government to provide service, since there is no authority for the proposition that a carrier and a tribe can, by agreement between them, preempt state regulation.

Finally, Project's concern with the designation of Western Wireless as an ETC, by whichever authority, is that its ability to serve its customers on the reservation with the state of the art technology now in place would be harmed by the unfair competition resulting from providing a windfall subsidy to Western Wireless on the basis of Project's cost.

If there are any questions in this matter, please contact me. Two copies of this letter are provided..

Sincerely yours



David Cosson

Attachments

cc: Commissioner Martin  
Sam Feder